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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/830,130

04/21/2004

Thomas Albertson

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EXAMINER

ARAJ, MICHAEL J

ART UNIT

PAPER NUMBER

3775

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05/27/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/830,130	<b>Applicant(s)</b> ALBERTSON ET AL.	
	<b>Examiner</b> MICHAEL J. ARAJ	<b>Art Unit</b> 3775	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 27 February 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-10, 12-21, 23-75, 77, 79 and 80 is/are pending in the application.
- 4a) Of the above claim(s) 49-74 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10, 12, 13, 16-18, 20, 21, 26, 28, 45-48, 75, 77, 79 and 80 is/are rejected.
- 7) ☒ Claim(s) 15, 27 and 29-44 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 02 October 2007 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Drawings***

Figures 5 and 6 should be designated by a legend such as --Prior Art-- because only that which is old is illustrated. Figures 5 and 6 of the present invention can be seen as Figures 1 and 2 of Scruggs (U.S. Patent No. 5,362, 475). See MPEP § 608.02(g). Corrected drawings in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-10, 12-21, 23-75, 77, 79 and 80 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cole et al. (U.S. Publication No. 2002/0091391) in view of Wagner et al. (U.S. Patent No. 6,391,030).

Cole et al. disclose a reconstruction system comprising a flexible cable (20) having first and second ends, a crimp fitting member (14), at least one locking

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cannulated threaded screw (150) having a cannulation and at least one reconstruction plate (32) comprised of at least one plate hole, wherein the first end of the cable comprises a crimp fitting member and wherein the crimp fitting member comprises a flat round disk-like head. The crimp fitting member comprises a preinstalled flattened disk-like crimp head having a diameter of from about 2mm to about 10mm and a thickness of from about .1mm to about 4mm and being composed of stainless steel. The crimp head is flat and has an upper and lower surface comprising rounded edges. The first portion of the crimp fitting member comprises a crimp shaft extending perpendicular to the lower surface of the crimp fitting member. (This is considered to be the hole in element 14) The flexible cable is comprised of a single strand wire and is cerclage wire and configured to lock with a bone fastener. The cannulated screw is selected from the group consisting of a locking and a non-locking screw that is at least partially threaded. With regard the statement of intended use and other functional statements, they do not impose any structural limitations on the claims distinguishable over Cole et al. which is capable of being used as claimed if one so desires to do so. *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Furthermore, the law of anticipation does not require that the reference “teach” what the subject patent teaches, but rather it is only necessary that the claims under attack “read on” something in the reference. *Kalman v. Kimberly Clark Corp.*, 218 USPQ 781 (CCPA 1983). Furthermore, the manner in which a device is intended to be employed does not differentiate the claimed apparatus from prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

Cole discloses the claimed invention except for the crimp fitting member having a second portion having a crimp head and a hole in the crimp head that is perpendicular to the crimp shaft that is extending longitudinally from the second portion. Wagner et al. discloses a first portion of the crimp fitting member having a crimp shaft (44) extending longitudinally from the second portion (45) and being attached to the first end of the flexible cable (10). Also disclosed is a second portion having a crimp head and a hole (26) in the crimp head that is perpendicular to the crimp shaft and adapted to slidably receive the second end of the flexible cable to secure the cable device with bone and to vary the tension of the cable. It would have been obvious to one skilled in the art at the time the invention was made to have created the device of Cole et al. with a crimp fitting member that has a hole perpendicular to the longitudinal axis of the crimp fitting member in view of Wagner et al., in order to have a more secure device that allows for variable tensioning of the cable system.

Cole also discloses the claimed invention except for the crimp head being of a polygonal shape or the crimp shaft being of a non-circular cross-section and having a kit with a plurality of crimp fitting members, screws and plates. It would have been an obvious matter of design choice to one skilled in the art at the time the invention was made to construct the crimp head and shaft in these manners, since applicant has not disclosed that such solve any stated problem or is anything more than one of numerous shapes or configurations a person ordinary skill in the art would find obvious for the purpose of providing a forming edge in the heating portion or clamp. In re Dailey and Eilers, 149 USPQ 47 (1966). It would have also been obvious to have a kit customized

to cater to the preference of a specific surgeon during a specific procedure and in such case may also provide additional equipment preferences of the surgeon. Such an example can be referenced to Vagley (U.S. Patent No. 6,158,437 col. 5, lines 40-50)

With regard to claims 18 and 19 it would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the diameters, lengths and angles of the plate holes in the ranges claimed, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233.

#### ***Allowable Subject Matter***

Claims 15, 27 and 29-44 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### ***Response to Arguments***

Applicant's arguments filed February 27, 2009 have been fully considered but they are not persuasive. Applicant argues that Cole does not disclose that the eyelet anchor is adapted to receive the cannulated screw or that the cannulated screw is adapted to receive a first portion of the crimp fitting member. With regard the statement of intended use and other functional statements, they do not impose any structural limitations on the claims distinguishable over Cole et al. which is capable of being used

as claimed if one so desires to do so. *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Furthermore, the law of anticipation does not require that the reference “teach” what the subject patent teaches, but rather it is only necessary that the claims under attack “read on” something in the reference. *Kalman v. Kimberly Clark Corp.*, 218 USPQ 781 (CCPA 1983). Furthermore, the manner in which a device is intended to be employed does not differentiate the claimed apparatus from prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

Applicant also argues that Wagner does not disclose any crimping structure. Figure 14 shows a tensioner that is considered to be a crimping device. Wagner found a beneficial way to create a device that would act like a crimping device but in a more reliable way. By using Wagner’s tensioner or crimping device, he can control the tension of the device. Basically Wagner can do away with the “crimp” itself in lieu of his device that can function the same way but with more control by having a hole in the “crimp head” that is perpendicular to the “crimp shaft”.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHAEL J. ARAJ whose telephone number is (571)272-5963. The examiner can normally be reached on M-F 8am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas Barrett can be reached on 571-272-4746. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Michael J Araj/  
Examiner, Art Unit 3775

/Thomas C. Barrett/  
Supervisory Patent Examiner, Art Unit 3775